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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
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Unbundling of Local Exchange Carrier)
Common Line Facilities)
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RM - 8614

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**NYNEX COMMENTS ON
PETITION FOR RULEMAKING**

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The NYNEX Telephone Companies¹ hereby file their comments on the petition of MFS Communications, Inc. ("MFS") for a rulemaking proceeding to require the local exchange carriers ("LECs") to unbundle, and to provide expanded interconnection to, "local loops" for use by competing state-authorized local exchange carriers ("CLECs").²

¹ The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

² In these comments, NYNEX uses the term "CLEC" to refer to common carriers, other than the incumbent LECs, who have been authorized by state regulatory authorities to provide local exchange services through their own central office-type switches. This should be distinguished from the term "competitive access provider," or "CAP," which refers to common carriers who provide state and interstate access services through facilities, which may include switches, that connect end users to the points of presence of interexchange carriers, and who offer other telecommunications services such as private line services, but who do not offer switched local exchange services with the status of a LEC.

I. Introduction And Summary

NYNEX agrees with MFS insofar as it argues that the Commission should address the issue of loop unbundling. NYNEX is a strong supporter of local exchange competition, and it has taken the lead in providing new forms of interconnection to the CLECs that have been certificated to provide local exchange services in the NYNEX region. NYNEX already offers unbundled local loops in its New York State tariffs, along with unbundled switch ports, tandem interconnection of CLEC end office switches, and other unique forms of interconnection. Because the Commission's access charge rules do not contemplate the offering of unbundled loops, NYNEX filed a request with the Commission on October 3, 1994, for a waiver to apply certain interstate access charges to unbundled loops.³ If the Commission's rules were amended to accommodate loop unbundling, such waiver requests would not be necessary.

However, NYNEX's experience in New York shows that the technical and regulatory issues associated with loop unbundling are not as simple as MFS suggests. NYNEX has only provided simple two-wire copper loops under its state unbundling tariff, and NYNEX has not addressed the technical issues involved with interconnection to more advanced "pair gain" loop technologies. In addition, MFS' proposal that the Commission should establish "guidelines" for the unbundling of local exchange rates by state regulatory commissions glosses over serious universal service and jurisdictional issues. While the New

³ See Public Notice DA 94-1136, released October 18, 1995.

York experience provides valuable insight into the issue of loop unbundling, the Commission does not have sufficient data at this time to issue proposed rules.

For these reasons, the Commission should not issue a notice of proposed rulemaking. At most, the Commission should issue a notice of inquiry, in which it should raise the issues discussed in these comments and in the comments filed by other parties in response to MFS' petition.

In these comments, NYNEX will respond to MFS' arguments and it will explore some of the technical and regulatory issues that are involved in loop unbundling. These comments are preliminary in some respects because NYNEX is addressing many of the operational issues associated with providing unbundled loops in New York. Accordingly, NYNEX expects to submit additional comments if and when the Commission issues a notice of inquiry in this proceeding.

To illustrate the issues involved in loop unbundling, we describe NYNEX's efforts in New York to unbundle business and residence local exchange services. The New York experience provides important insights into the technical and regulatory issues raised by MFS' petition. NYNEX also provides its views of MFS' arguments that loop unbundling is necessary for local exchange competition. For instance, MFS' claim that the CLECs cannot provide their own loops is directly contradicted by the loop facilities that MFS has

constructed to hundreds of buildings, and its claim that the LECs' "bundled" local exchange rates are *per se* violations of the antitrust laws is simply wrong.

MFS' proposal that the Commission issue "guidelines" for state pricing of unbundled loops is ill-advised. The Commission does not need to develop solutions to state regulatory issues in order to provide unbundled loops for interstate services. State rates for local exchange services involve universal service issues that cannot be resolved through a one-size-fits-all federal solution. In these comments, NYNEX demonstrates how the Commission can deal with loop unbundling without infringing on state regulatory prerogatives.

II. MFS Is Wrong In Arguing That Loops Are A Bottleneck -- Loop Competition Will Occur Where The CLECs Identify Profit Opportunities

MFS' petition rests on its premise that the local loops provided by the LECs are "bottleneck" facilities and that it is economically infeasible for anyone to replace those loops.⁴ MFS claims that there are insurmountable obstacles to the construction of loop facilities by a CLEC, including building access impediments and the costs of franchising and rights-of-way.

The CAPs, including MFS, have already disproved these arguments. The CAPs are rapidly installing loop facilities to office buildings in major cities throughout the country. In New York City, for example, the CAPs have installed

⁴ See MFS Petition at pp. 6-8.

fiber loop facilities to over 1,000 of the largest office buildings, which contain thousands of high volume business customers. These facilities, which are used primarily for interstate special access services and state private line services, can also be used to provide a full range of local exchange services depending only on the equipment that a CAP chooses to install in its switching nodes. The CAPs have concentrated their installation of loop facilities in dense urban business markets up to this point only because the profits are highest in those markets. Entry into residential markets is inevitable as the CAPs expand their operations.

The recent entry of a major cable TV provider, Cablevision Lightpath, as a CLEC in New York disproves MFS' claim that "cable overlay" is not a feasible alternative to the local loop.⁵ Cablevision Lightpath will use its own loop facilities to provide local exchange service, cable service, and other services to residential customers in its operating area. Other cable companies, such as Time Warner, have announced their intentions to enter the local telephone market in NYNEX's operating territory.

NYNEX's experience with loop unbundling in New York shows that the CLECs are just as likely to compete for loops as for other local exchange services offered by the LECs. In response to the orders of the New York Public Service Commission ("NYPSC"), NYNEX unbundled its Centrex, Private Branch Exchange ("PBX"), business, and residence exchange services into "link" and "port" components, and it filed tariffs providing interconnection to unbundled

⁵ See MFS Petition at pp. 7-8.

links and ports.⁶ Under these tariffs, a CLEC that is collocated in a NYNEX central office can connect end users to its switches by reselling NYNEX's common lines. A CLEC can also offer competitive common line services by connecting its own loop facilities to the ports on NYNEX's switches. Of course, a CLEC can also use its own loop facilities and its own switches to provide local exchange services that completely bypass NYNEX's network.

Contrary to MFS' arguments that the loop is irreplaceable, the CLECs have taken advantage of NYNEX's unbundling to compete for both switching services and loop services. In NYNEX's experience, a CLEC will use whichever combination of its own facilities and NYNEX's facilities is most efficient in a given situation.

For example, when NYNEX unbundled its digital PBX access services (which NYNEX offers under the trademark "FlexPath"), it was charging approximately \$1,000 per month for the bundled service. NYNEX unbundled

⁶ See *Opinion and Order Concerning Comparably Efficient Interconnection Arrangements and Instituting Proceeding*, Cases 88-C-004, 88-C-063, 91-C-1174, Opinion No. 91-24, issued and effective November 25, 1991; *Order Accepting in Part and Modifying in Part Compliance Tariff Filing*, Case No. 91-C-1174, issued and effective December 18, 1992; *Order Directing the Filing of Tariffs and Requesting Additional Comments*, Case No. 91-C-1174, issued and effective May 25, 1994; New York Telephone Company Tariff PSC No. 900, Sections 25 & 26. The link represents a pair of wires or a virtual circuit path from a customer's premises to a NYNEX central office. The port represents the facilities which connect the link to NYNEX's central office switch and that provide the customer with the function of dial tone and a unique customer address (*i.e.*, a telephone number). See *Order Accepting in Part, Suspending in Part, and Rejecting in Part Compliance Tariff Filing*, Case Nos. 88-C-004, 88-C-063, 91-C-1174, issued and effective July 23, 1992, Staff Report, p. 5.

this service into a \$533 charge for the link and \$467 for the port (which included \$144 in end user common line charges). The link on a FlexPath service is a DS1 transport facility, operating at the same bit rate and with the same number of channels as a DS1 Special Access channel termination.⁷ Considering that NYNEX was charging approximately \$275 for a DS1 Special Access channel termination at the time that it unbundled its FlexPath rates, and that the CAPs were already offering competitive DS1 Special Access services in New York, it should come as no surprise that NYNEX's \$500 link rate became the target of competition. The CLECs used the fiber facilities that they had installed to hundreds of buildings in New York to offer link services into NYNEX's PBX ports. When NYNEX surveyed its expanded interconnection services in 1993, it found that most of the state private line services offered by collocated competitors were replacements for NYNEX FlexPath links.

The only conclusion that can be drawn from this experience is that competition is likely to emerge wherever the CLECs and the CAPs believe that they can provide a service at a lower price than the LECs. The LECs do not have an inherent cost advantage in providing loops. Regardless of whether the Commission orders loop unbundling, the CLECs and the CAPs will continue to construct their own loop facilities and they will continue their evolution into full-service telephone companies.

⁷ A FlexPath link is a T-1 digital high capacity channel providing 24 voice grade channels. It is used to connect a digital PBX to a digital interface on a NYNEX switch which provides the equivalent of 24 line side connections.

III. Loop Unbundling Involves Pricing And Universal Service Issues That Can Only Be Resolved In The State Jurisdiction

NYNEX's experience in New York also shows that loop unbundling affects the methods by which universal service is supported in the state jurisdiction. The Commission should not move forward on loop unbundling until it develops a record on the impact that its actions would have on ratemaking issues that are primarily in the state jurisdiction.

Local exchange competition is primarily a state issue and it cannot be decided by the Commission absent state concurrence. Local exchange services such as residential and business lines, local and toll calling, and other features and functions are tarified at the state level. Most states require certification and tariff approval before a carrier is permitted to offer local exchange services. Therefore, the Commission must coordinate with the state jurisdictions, rather than dictate treatment of state ratemaking issues, if it wants to promote unbundling and competition in the local exchange.

The universal service issues associated with loop unbundling are illustrated by NYNEX's unbundling of residential exchange service in New York. NYNEX's total company cost for a local exchange link is \$22.85, while its rate for Residence Message Rate service (including the link and the port) is \$6.60 plus a \$3.50 end user common line charge ("EUCL"), for a total of \$10.10 per

month.⁸ The \$10.10 rate was set below cost as a matter of regulatory policy, initially to make telephone service affordable to as many customers as possible, thus promoting universal service objectives.⁹ NYNEX recovers the shortfall between residence exchange costs and rates through revenues it receives from other services that are priced above cost, such as business services, toll services, local usage, features and functions, and interstate and intrastate access.

If NYNEX had unbundled the \$10.10 rate on a price neutral basis, it would have had to provide loops to its competitors at below-cost rates. The NYPSC dealt with this problem by requiring NYNEX to file cost-based residential link rates and to file port rates at \$1.00 (which is well below cost) pending further investigation in the NYPSC's Competition II proceeding. NYNEX filed a \$19.35 rate for an unbundled residence link (plus a \$3.50 EUCL in the interstate tariff).¹⁰ Thus, NYNEX's local exchange competitors can gain access to unbundled NYNEX loops at rates which have been set to recover the same costs that NYNEX incurs in providing a link to itself.

Although the pricing of unbundled residence exchange rates at cost allowed NYNEX to avoid directly subsidizing its competitors, it still created an

⁸ See *Order Directing the Filing of Tariffs and Requesting Additional Comments*, Case No. 91-C-1174, issued and effective May 25, 1994, p. 14; NYNEX Petition for Waiver filed October 3, 1995, p. 3.

⁹ While it is no longer obvious that cost-based rates would make local exchange service unaffordable to customers in general, the fact remains that local exchange rates incorporate regulatory policy objectives.

¹⁰ See New York Telephone Company Tariff PSC No. 900, Switched Voice Grade Analog Link Service, Section 26, Original Page 4.

adverse impact on NYNEX's ability to sustain the funding of universal service. A CLEC that purchases a NYNEX residential link provides the bundled exchange service to the end user and NYNEX loses the contribution associated with charges for intrastate and interstate access services, toll services, and features and functions. To the extent that a CLEC can target those end users that generate more than enough usage to offset the below-cost prices for basic exchange service, while NYNEX must serve all customers regardless of whether a particular customer generates enough usage to cover the company's costs, NYNEX will bear an increased burden on its ability to provide ubiquitous local exchange service. Similarly, if a CLEC uses NYNEX links only in high cost areas and builds its own facilities in low cost areas, NYNEX becomes further disadvantaged.

Nonetheless, some CLECs have claimed that NYNEX's pricing of unbundled loops above the cost of the basic residence exchange rate hurts competition. While the economically efficient solution may be to price all services at cost, that raises important universal service issues. The NYPSC rejected NYNEX's original proposal to move in the direction of pricing the bundled rates at the sum of the unbundled rates by raising the residence exchange rate to cost over a transition period.¹¹ Alternatives could be to create a universal service fund into which all LECs and CLECs contribute, or to impose a

¹¹ See *Order Directing the Filing of Tariffs and Requesting Additional Comments*, Case No. 91-C-1174, issued and effective May 25, 1994.

shared burden for supporting universal service obligations on the CLECs and on the LECs, as well as on other carriers. The NYPSC is investigating these issues in its Competition II proceeding.

Many other states are currently looking at the impact of competition and interconnection on universal service and ratemaking issues. For example, the Massachusetts Department of Public Utilities has begun a comprehensive investigation that will consider issues such as unbundling, intraLATA presubscription, reciprocal compensation, access to conduits and poles, pricing, universal service, and number portability.¹² The state regulatory commissions in Maine, Vermont and Rhode Island have also initiated investigations into these issues.¹³

These issues cannot be resolved by a federal rule or by the issuance of pricing "guidelines" by the Commission to the state regulatory commissions. Even in a state such as New York, the cost/rate disparity of residence measured exchange service is just one of the issues that affects universal service. State-wide averaging of exchange rates is another way of meeting universal service

¹² See Docket D.P.U. No. 94-185, *An Investigation by the Department on Its Own Motion Into IntraLATA and Local Exchange Competition in Massachusetts*, Order issued January 6, 1995.

¹³ See Rhode Island Public Utilities Commission Docket No. 2252, *Comprehensive Review of Intrastate Telecommunications Competition*; Maine Public Utilities Commission Docket No. 94-114, *Inquiry into the Provision of Competitive Telecommunications Services*; Vermont Public Service Board Docket 5713, *Investigation into NET ONA Filing*.

objectives.¹⁴ There are as many different cost/rate disparities and methods of funding universal service objectives as there are states. A one-size fits all approach, as proposed by MFS, clearly is too simplistic to deal with this complex issue. The Commission should not take actions with regard to loop unbundling that would undermine the variety of state approaches to the funding of universal service.

IV. The Commission Can Provide For Unbundling Of Loops At The Interstate Level Without Interfering In The State Jurisdiction

NYNEX agrees with MFS that the Commission should adopt rules for the pricing of interstate access charge elements to take into account state actions that have required the LECs to unbundle the loop and port components of their local exchange services.¹⁵ However, NYNEX does not agree with MFS' argument that the Commission should go further and preemptively order the unbundling of common line related services at the state level or that the Commission should adopt "voluntary" guidelines for state pricing of unbundled loops.

MFS tries to entangle the Commission in state ratemaking issues by arguing that the Commission cannot provide for unbundled loops strictly out of

¹⁴ For example, the New York State link cost described above is a state average; the monthly cost of a loop in a low cost area of New York State is \$18.18, but it is \$34.54 in a high cost area. See *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, NYNEX Comments filed October 28, 1994, p. 25.

¹⁵ See MFS Petition at p. 27.

the interstate tariffs. This is incorrect. The Commission can provide for access to unbundled loops without either guiding or coercing the states into taking similar actions. If the Commission ordered the LECs to provide unbundled loops, the LECs could simply establish flat-rated loops in their interstate tariffs and recover all of the costs of the loops through their interstate rates. From the LEC's perspective, an unbundled loop is a dedicated facility, since the LEC cannot measure usage on the facility and since the capacity of the facility is dedicated to the CLEC's use. If the traffic that a CLEC transmits over an unbundled loop is more than 10 percent interstate, the Commission's rules require the LEC to assign the costs of the loop to the interstate jurisdiction and to recover these costs solely through interstate rates.¹⁶

MFS apparently anticipated this point because it argues that the unbundled loops that the LECs currently offer in their expanded interconnection tariffs (*i.e.*, Special Access Voice Grade channel terminations) are functionally different from common lines and that they are costlier to purchase than a common line.¹⁷ MFS also points out that the testing and channel performance functions that the LECs carry out for Special Access lines are performed by the LEC's central office switch for common lines. Therefore, MFS argues that the

¹⁶ See 47 C.F.R. Section 36.154(a)-(c).

¹⁷ See MFS Petition at pp. 9-12. MFS argues that Special Access loops are priced too high because they include the costs of greater performance levels than common lines and the costs of line testing and monitoring functions that are performed by the switch for a common line. MFS also complains about the longer installation intervals for Special Access services.

CLECs should not be required to purchase the unwanted features of Special Access channel terminations when all they want is an unbundled common line which they will test and monitor through their own switches.

The short answer to these arguments is that MFS overlooked another type of loop that can be purchased out of the LECs' interstate tariffs, and that is functionally similar to a common line -- a WATS access line. A WATS access line is a dedicated facility that is priced like an interstate Special Access line and that is connected to a central office switch through a two or four wire connection.¹⁸ While NYNEX's expanded interconnection tariff does not list WATS access lines as being available for interconnection to a collocater's multiplexing node, the tariff provides that NYNEX will offer interconnection to other switched or special access services upon request within 45 days.¹⁹ Moreover, the Commission can always order the LECs to provide WATS access lines to collocated CLECs, or to provide other types of dedicated facilities, as necessary to permit the CLECs to purchase unbundled loops that are capable of interconnection with the CLECs' switches.²⁰

¹⁸ See, e.g., NYNEX Telephone Companies Tariff FCC No. 1, Section 7.2.10(A).

¹⁹ See NYNEX Telephone Companies Tariff FCC No. 1, Section 28.4.1(B).

²⁰ For example, MFS may feel that the WATS access line is priced too high because, where such a line is connected to a CLEC switch, the CLEC will perform the testing and maintenance functions that are currently performed by the LEC switch on a WATS access line. However, it would be easy for the LEC to offer an adjusted price for a WATS access line to an expanded interconnection node that takes into account any cost differences between a facility connected to a LEC switch and one connected to a CLEC switch.

MFS is incorrect in arguing that NYNEX's Petition for Waiver of the Commission's Part 69 rules to apply EUCL charges to unbundled common lines in any way supports MFS' position that Special Access facilities cannot function as unbundled loops.²¹ NYNEX requested a waiver to apply interstate common line charges to loops that were categorized as common lines in NYNEX's state tariffs and that the NYPSC required NYNEX to unbundle into link and port elements. In such cases, the loops clearly are categorized as common lines. However, there is no reason why a loop that is a dedicated facility cannot be provided solely out of either the interstate or the state tariffs depending on the percentage of interstate use.

While the Commission clearly has the ability to require the LECs to offer unbundled loops in their interstate tariffs, the Commission should, as a matter of policy, consider the impact of such a requirement on state regulatory mechanisms for support of universal service. For instance, a state rate structure may use the revenues from high volume business customers to provide contribution to below-cost rates for low volume or rural customers. A CLEC might undermine such a contribution flow if it purchased dedicated loops from a LEC's interstate tariffs to provide exchange services to high volume customers. In addition, the state regulatory commission may incorporate contribution flows in the LEC's state carrier common line rates that would be lost if a loop were reclassified as a dedicated interstate facility.

²¹ See MFS Petition at p. 10.

The best way to deal with these issues is for the Commission to recognize that all common lines are purchased out of the state tariffs as exchange services. The Commission's Part 69 rules simply state what access charges apply to traffic that is provided over a common line. Therefore, unbundling of common lines must start in the state jurisdiction. The Commission should adopt rules that set forth the interstate access charge elements that apply to common lines that are unbundled at the state level. If a state has not required the LECs to unbundle their common lines, the Commission can require the LECs to offer dedicated loops in their interstate access tariffs to the CLECs, provided that the Commission finds that such action will not undermine state mechanisms for support of universal service.

V. MFS Oversimplifies The Technical Issues Involved In Loop Unbundling

MFS proposes that the Commission establish rules requiring the LECs to unbundle loop facilities under four network architectures; (1) a copper wire pair; (2) "double-ended pair gain;" (3) "single-ended pair gain;" and (4) remote switch used for pair gain.²² There are two issues that the Commission must explore before adopting the interconnection rules proposed by MFS -- interconnection and cost recovery. Neither is as simple as MFS suggests.

²² See MFS Petition at pp. 35-42.

First, there is no precedent for most of the types of interconnection that MFS proposes. NYNEX's state tariffs offer unbundled common line loops only over voice grade analog links, *i.e.*, copper pairs.²³ Therefore, if NYNEX is serving an end user over digital or fiber facilities, and if a CLEC requests that NYNEX provide an unbundled link to that end user, NYNEX arranges a two-wire copper loop by cross-connecting pre-existing loop facilities from the end user premises to the central office frame, where a cross-connection to the CLEC's expanded interconnection multiplexing node is provided.²⁴ Under the tariff, if facilities are not available to provide a two-wire loop, special construction charges apply.²⁵ Moreover, NYNEX is still addressing the operational procedures associated with providing unbundled analog copper loops, and it has not determined how to provide such loops over the types of advanced high capacity facilities that MFS describes in its petition.

MFS' charts demonstrate that there are significant technical issues to be resolved where the LEC provides loops over digital pair gain or fiber facilities. In such situations, there is no frame or natural demarcation point on the line side

²³ See New York Telephone Company Tariff PSC No. 900, Switched Voice Grade Analog Link Service, Section 26, Original Page 1.

²⁴ If copper facilities are not available and the end user line is provided over double-ended pair gain, NYNEX can install a card in the multiplexer to provide a two-wire connection to the CLEC's expanded interconnection node which provides the equivalent of a two-wire copper loop. However, NYNEX has not installed any loops over pair gain technology as of this date, and NYNEX is working on the operational issues associated with providing such interconnection.

²⁵ See New York Telephone Company Tariff PSC No. 900, Switched Voice Grade Analog Link Service, Section A.3.

of the central office switch where a single end user line can be connected to an expanded interconnection cross-connect. Even MFS concedes that the LEC may need to install dedicated de-multiplexing equipment to strip off individual end user channels on high capacity facilities to provide a cross-connect to a collocated CLEC.²⁶ Also, MFS concedes that some loop facilities involve proprietary interfaces established by the manufacturers.²⁷ Clearly, these issues need further exploration before the Commission moves forward on loop unbundling.

Second, such forms of interconnection raise issues of cost recovery and efficiency. The LECs are installing high capacity digital and fiber facilities in the local loop in order to meet the price cap productivity standards and to provide better, more reliable service to their customers. The increased efficiency of these facilities is an essential element in the ultimate solution to the issue of universal service -- to reduce costs so that high quality, high capacity service can be made available to all consumers at affordable rates. MFS would require the LECs to move backwards by installing costly intermediate equipment in high capacity loop facilities in order to strip out individual end user channels for connections to the CLECs.²⁸ That defeats the purpose of installing high capacity facilities in

²⁶ See MFS Petition at p. 40-42 and Configuration C.

²⁷ See MFS Petition at p. 41.

²⁸ See MFS Petition at pp. 39-42. Ironically, MFS wants the Commission to require the LECs to price unbundled loops no higher than long run incremental cost when such a costing methodology would be based on the efficiencies that MFS would undermine by requiring the LECs to install new intermediate equipment. See MFS Petition at pp. 45-46.

the first place. At the very least, the Commission should require the CLECs to incur the costs of any equipment and facilities that the LECs must install solely to provide the CLECs with connections to unbundled loops. The Commission should also consider whether there is any economic rationale for requiring the LEC to build loop facilities for a CLEC instead of requiring the CLEC to build its own facilities.

Third, the type of access desired by MFS would appear to be a service offering which might conflict with the Commission's CPE unbundling rules. The LECs employ pair gain technologies transparently to end users and consistently with the multiplexer exception to the Commission's CPE unbundling rules. To the extent that MFS is looking to have access to these systems, the Commission must address its current CPE rules.

Clearly, there are numerous technical and economic issues that the Commission must address before adopting any rules to require the LECs to provide unbundled loops. The Commission should give all interested parties an opportunity to address these issues before adopting any rules that would place new interconnection burdens on the LECs.

VI. Unbundling Of The Local Loop Is A Matter Of Policy, Not Antitrust Law

MFS attempts to bolster its case for Commission-mandated unbundling of the local loop by claiming that the LECs' "bundled" rates for local exchange services violate the antitrust laws.²⁹ MFS claims that the bundled rates constitute an unlawful tying arrangement and that the Commission must prescribe the relationship between bundled and unbundled rates so as to avoid a "price squeeze." By raising these arguments, MFS hopes to induce the Commission to require the LECs to unbundle services that are clearly in the state jurisdiction and to set guidelines for the unbundling of state rates.

The Commission should reject MFS' arguments for two reasons. First, MFS is wrong in arguing that the LECs' local exchange rates would be classified as an unlawful tying arrangement under the antitrust laws. Second, the Commission has no jurisdiction to require the unbundling of state telephone rates or to resolve other pricing issues at the state level.

Under the antitrust laws, a tying arrangement is one where a party has agreed to sell one product on the condition that the buyer also purchase a different product.³⁰ A tie-in may be a violation of the antitrust laws if the seller

²⁹ See MFS Petition at pp. 12-26.

³⁰ See, e.g., *Northern Pacific Railroad v. United States*, 356 U.S. 1 (1958).

has sufficient market power in the tying product to restrain competition in the tied product.

As MFS recognizes, the first criterion which must be met to prove the existence of an unlawful tying arrangement is that there are two separate products as defined by market demand.³¹ The two product test is designed to show whether competition in one product (the tied product) has been adversely affected because buyers cannot purchase another product (the tying product) without purchasing the tied product from the same supplier. MFS has not shown that there is any market or any market demand for stand-alone switching services, which it characterizes as the tied product. Therefore, MFS has not shown that this is a separate product from the so-called tying product, the loop.

Both the LECs and the CLECs sell their exchange services as "bundled" packages that include the loop from the end user premises to the switch and the switched services.³² The only evidence of "demand" for unbundled loops that MFS has been able to present is its own request for unbundled loops.³³ This is the quintessential "bootstrap" argument. If a party could prove that there were

³¹ See MFS Petition at pp. 19-20. The critical issue is not whether there is a functional relationship between the two products, but whether there is sufficient demand for the "tied" product to identify a separate market from the "tying" product. See *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984)

³² When collocated carriers in New York purchase unbundled links and ports, they typically bundle these elements with their own services in providing service packages to end users.

³³ See MFS Petition at pp. 20-21.

two separate markets for the components of a single service simply by reference to its own request, the test would be meaningless.

MFS' defective tying argument is a pretext for its ultimate goal -- to have the Commission prescribe the rate structure for unbundled local exchange rates. MFS wants the Commission to prevent the LECs from engaging in a "price squeeze" by charging rates for unbundled loops that are so high relative to their rates for local exchange services that the CLECs cannot compete in the local exchange market using unbundled loops.³⁴ These rate issues are clearly outside the Commission's jurisdiction. As noted above, the state regulatory commissions have frequently set the rates for the LECs' residence local exchange below cost in order to meet public policy goals. Thus, any "price squeeze" is an integral part of regulatory decisions at the state level. Whether or not the antitrust laws would apply in such circumstances is a complex issue depending on the level of regulatory involvement.³⁵ In any event, the Commission has neither the jurisdiction nor the expertise to get involved in such issues.

The Commission should reject MFS' spurious antitrust analysis and MFS' attempt to manipulate the Commission into an investigation of state ratemaking issues. The Commission should decide the issue of loop unbundling strictly as an interstate access policy issue.

³⁴ See MFS Petition at pp. 24-26.

³⁵ See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943).

VII. Conclusion

NYNEX agrees with MFS that the Commission should initiate a rulemaking proceeding to adopt access charge rules that would take into account the unbundling of local exchange services at the state level. However, there are numerous issues that need to be investigated before the Commission issues its own requirements for loop unbundling. In these comments, NYNEX has discussed some of the issues that must be addressed. NYNEX reserves the right to submit additional comments if the Commission decides to move forward with a rulemaking proceeding.

Respectfully submitted,

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